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No. 404

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In the Supreme Court of the United States
October Term, 1958

MELROSE DISTILLERS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit*

MEMORANDUM FOR THE UNITED STATES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. 15-21) is not yet reported. The opinion of the district court (App. 43-82¹) is reported at 138 F. Supp. 685.

JURISDICTION

The judgment of the court of appeals (Pet. 22) was entered on August 29, 1958, and the petition

¹ "App." refers to the printed appendix to appellants' brief in the court of appeals.

for a writ of certiorari was filed on September 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Delaware and Maryland corporation statutes, pending criminal proceedings abate upon the dissolution of a corporate defendant.

2. Whether the Maryland Alcoholic Beverages Law immunizes from the Sherman Act a conspiracy to fix prices of alcoholic beverages shipped in interstate commerce into the state of Maryland, and a conspiracy and an attempt to monopolize such commerce.

STATUTES INVOLVED

The pertinent provisions of Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 2), commonly known as the Sherman Act, are as follows:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

Section 278, Delaware General Corporation Law (Section 278, Title 8, Chapter 1, Delaware Code of 1953), provides in pertinent part:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of three years from such expiration or dissolution, bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which the corporation shall have been established. With respect to any action, suit, or proceeding begun or commenced by or against the corporation prior to the expiration or dissolution and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of the expiration or dissolution, the corporation shall, only for the purpose of such actions, suits or proceedings so begun or commenced, be continued bodies corporate beyond the three-year period and until any judgments, orders, or decrees therein shall be fully executed.

Section 78(a), Article 23, Annotated Code of Maryland 1951, provides in part as follows:

The dissolution of a corporation shall not relieve its stockholders, directors or officers from any obligations and liability imposed on them by law; nor shall such dissolution abate any pending suit or proceeding by or against the corporation, and all such suits may be continued

with such substitution of parties, if any, as the court directs. * * *

STATEMENT

On April 6, 1955, an indictment was returned charging 14 corporate manufacturers, 7 corporate wholesalers, 3 trade associations, and 31 individuals, with conspiring to fix the wholesale and resale prices of alcoholic beverages shipped in interstate commerce into Maryland, and with conspiring to monopolize and attempting to monopolize such commerce, in violation of Sections 1 and 2 of the Sherman Act (App. 1-14). The gravamen of the price-fixing conspiracy was a scheme, enforced by boycott, to compel manufacturers and wholesalers to establish "fair-trade" prices, and to compel retailers to observe such prices (App. 11).

Petitioners were 3 of the 14 corporate defendant manufacturers (App. 2).² Two of them were Maryland corporations; the third was a Delaware corporation.

On May 2, 1955—almost a month after the indictment was returned—petitioners were dissolved (Pet. 16). They then moved to dismiss the indictment on the grounds, *inter alia*, (1) that their dissolution abated the proceeding as to them; (2) that all of the acts charged were "permitted, sanctioned and encouraged" by the laws and policy of the State of Maryland; and that under the Twenty-First Amendment, such laws and policy preempted the

² They were wholly-owned subsidiaries of Schenley Industries, Inc., also a defendant corporate manufacturer (Pet. 4).

field of alcoholic beverage regulation, to the exclusion of the Sherman Act (App. 16, 23, 27, 35-43).

The district court denied the motions (App. 83). It ruled (App. 82) that "under the applicable Delaware and Maryland statutes, the corporate existence of the dissolved corporations continues to a sufficient extent to permit the prosecution of this criminal proceeding." The court also rejected the contention that Maryland law immunized petitioners from prosecution for the acts charged in the indictment (App. 50-71).

Petitioners (together with a number of other defendants) then pleaded *nolo contendere* and were fined. Petitioners appealed their conviction, on the grounds (1) that their dissolution abated the proceedings, and (2) that Maryland law immunized their conduct from Sherman Act liability.

The court of appeals unanimously affirmed. The court, noting that there is a "division of authority" among the circuits, held (Pet. 16-20) that the Delaware corporation statute, which provides for continuation after dissolution of "any [pending] action, suit, or proceeding," covers criminal proceedings. It further ruled (Pet. 20) that the Maryland statute "in all its essentials" is "of like effect"; and it stated (Pet. 18) that to accept petitioners' construction of those acts "would offend our sense of justice, pervert the obvious policy of the state in enacting these survival statutes, and provide an easy avenue of escape by corporations from the consequence of their criminal acts by the simple process of voluntary dissolution." The court also rejected, as "without merit,"

petitioners' contention that the acts and conduct charged were "permitted, sanctioned, and encouraged" by the law and policy of the state of Maryland (Pet. 20). The court ruled (Pet. 21) that neither the Maryland Alcoholic Beverages Law nor the Maryland Fair Trade Law "affords protection against prosecution for a conspiracy to fix prices 'horizontally' or a conspiracy to monopolize trade or an attempt to do so."

ARGUMENT

1. As petitioners point out (Pet. 7), the circuits are in conflict with respect to whether Delaware law provides for survival of pending criminal proceedings after dissolution of corporate defendants.² In the 1955 Term the Government requested review of the question, but the Court denied certiorari. *United States v. United States Vanadium Corporation*, 351 U.S. 939.

The instant petition shows that the problem continues to recur. The Delaware courts have not passed on the question, and there seems little likelihood that they will do so in the near future. Although we believe that the court below correctly in-

² The four circuits which have passed upon the question are equally divided. In addition to the court below, the Seventh Circuit has held that Delaware law provides for survival of pending criminal proceedings. *United States v. P. F. Collier & Son Corp.*, 208 F. 2d 936. The Sixth and Tenth Circuits have reached the contrary conclusion. *United States v. Line Material Company*, 202 F. 2d 929 (C.A. 6); *United States v. Safeway Stores*, 140 F. 2d 834 (C.A. 10); *United States v. United States Vanadium Corporation*, 230 F. 2d 646 (C.A. 10).

terpreted Delaware law, the issue remains unsettled in the lower courts. A substantial, if not the major, number of corporate defendants in Sherman Act cases are Delaware corporations, and the answer to whether a Delaware corporation may escape Sherman Act criminal punishment by dissolution should not depend upon the circuit in which the proceeding is brought. Indeed, unless resolved by this Court, the existing conflict is likely to lead to further litigation in those circuits which have not yet passed upon the question.

Accordingly, we do not oppose certiorari with respect to the first question presented.⁴ If certiorari is granted, we shall also urge, as another ground for sustaining the judgment below, that where a dissolved corporation continues to exist under state law for many purposes (even if not for purposes of state criminal prosecution), it is an "existing" corporation (under Section 8 of the Sherman Act) which remains subject to criminal prosecution under that Act. See our petition for certiorari in the *Vanadium* case, *supra*, No. 848, October Term, 1955, pp. 8-11.

2. Petitioners also contend (Pet. 13) that the acts charged in the indictment were "compatible" with the Maryland Alcoholic Beverages Law, and therefore are not "indictable offenses under the Sherman Act." The court of appeals correctly held (Pet. 21), however, that the price-fixing conspiracy and the

⁴ Although there is no conflict with respect to Maryland law, we believe that the Maryland statute is sufficiently similar to the Delaware law so that, if the Court does review the Delaware law, it should also review the Maryland law.

conspiracy and attempt to monopolize here charged, were not "in any way permitted, sanctioned, or encouraged by the announced governmental policy and law of the State of Maryland." It noted (Pet. 20-21) that the state alcoholic beverages law merely prohibits discrimination by manufacturers and wholesalers between customers; and that the regulatory power of the State Comptroller of the Treasury over alcoholic beverage prices is designed to preserve competition among retailers, and does not sanction a "horizontal" price-fixing conspiracy of the kind here charged. In short, as in *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299, the acts here charged (admitted by petitioners' plea of *nolo contendere*, see *United Brotherhood of Carpenters and Joiners v. United States*, 330 U.S. 395, 412) "have no legal sanction under state law." Accordingly, "[t]he Sherman Act is not being enforced in this case in such manner as to conflict with the law of" Maryland, and "[w]e therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state" (*Frankfort Distilleries case, supra*).

Since Maryland law does not sanction petitioners' acts, there is no occasion to reach the broader question (Pet. 13-14) whether, if such acts were "compatible" with state law, they would be immune from prosecution under the Sherman Act. In any event, this Court has pointed out that although the Twenty-First Amendment "bestowed upon the states broad regulatory power over the liquor traffic within their territories," it "has not given the states plenary and exclusive power to regulate the conduct of persons

doing an interstate liquor business outside their boundaries." *Frankfort Distilleries case, supra; William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173.

CONCLUSION

If the petition for a writ of certiorari is granted, review should be limited to the first question presented.

Respectfully submitted.

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OCTOBER 1958